

**United States Department of Labor
Employees' Compensation Appeals Board**

N.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

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**Docket No. 14-1978
Issued: January 20, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 12, 2014 appellant filed a timely appeal from a March 18, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As the last merit decision was issued in this case on February 21, 2013, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that his request for reconsideration was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On July 20, 2006 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim alleging that on July 20, 2006 he experienced a sharp pain in his right wrist as a result of pushing

¹ 5 U.S.C. § 8101 *et seq.*

a loaded cart and turning right. He did not stop work. OWCP accepted appellant's claim for tenosynovitis of the right hand and wrist.

In a November 8, 2006 progress report, Dr. Nicole M. Pham-Bailey, Board-certified in physical medicine and rehabilitation, conducted a follow-up examination for appellant's right wrist and thumb pain. Appellant informed her that his right thumb, hand, and forearm pain had increased since he returned to casing mail over two hours at work. Upon examination of his right wrist, Dr. Pham-Bailey observed tenderness of the dorsal right wrist compartment and pain with right wrist dorsiflexion to 60 degrees. She reported some tightness in the thumb extensor tendon and grossly intact sensation. Finkelstein's test was positive. Dr. Pham-Bailey diagnosed right wrist de Quervain's tenosynovitis and resolved right thumb abrasion. She recommended that appellant work modified duty with restrictions of no grasping with the right hand, no lifting over five pounds, and limited casing of the mail with his left hand (right hand assist) up to three hours in an eight-hour workday.

On February 13, 2007 appellant started working modified duty. He continued to receive medical treatment and experience intermittent periods of disability. OWCP paid appropriate medical and wage-loss compensation benefits. On March 31, 2009 appellant stopped work because the employing establishment was no longer able to accommodate his work restrictions. OWCP again paid appropriate wage-loss compensation benefits. On August 4, 2009 appellant was placed on the periodic rolls.

On July 27, 2011 OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Joseph P. Conaty, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant continued to suffer residuals and disability as a result of the July 20, 2006 employment injury. In a September 22, 2011 report, Dr. Conaty reviewed the medical record and the statement of accepted facts. Upon examination of appellant's upper extremities, he reported normal muscle strength throughout the muscle groups and minimal tenderness over the medial aspect of the wrist, overlying the radial styloid. Finkelstein, Phalen's, and Tinel's signs were negative bilaterally. X-rays of the right wrist and hand with comparison view of the left demonstrated normal bone density and no arthritic changes. Dr. Conaty opined that appellant's right wrist strain with tendinitis had clinically recovered. He noted that there was only localized, minimal tenderness but x-rays and range of motion were normal. Dr. Conaty recommended an up-to-date magnetic resonance imaging (MRI) scan examination and opined that appellant was capable of performing his usual job as a letter carrier without restrictions.

OWCP referred appellant for an MRI scan. In an October 20, 2011 MRI scan of the right wrist, Dr. John N. Loizeaux-Witte, a Board-certified diagnostic radiologist, observed mild arthrosis at the articulation between the radioulnar joint and lunate, characterized by mild lunate marrow and increased signal intensity. He also reported no dissociation or widening between the proximal or distal carpals.

In an October 17, 2011 supplemental report, Dr. Conaty reviewed the October 20, 2011 MRI scan report. He opined that, based on the findings, there was no evidence of tendinitis but only mild, limited arthrosis to the radiocarpal joint and lunate with an intact fibrocartilage complex. Dr. Conaty stated that his previous impression remained unchanged.

On November 8, 2011 OWCP issued a proposal to terminate appellant's medical and wage-loss compensation benefits based on the second opinion report of Dr. Conaty who determined that appellant's accepted right wrist injury had resolved. In a decision dated December 15, 2011, it terminated appellant's entitlement to wage-loss and medical compensation benefits effective December 17, 2011.

In an appeal request form dated September 17, 2012 and received by OWCP on September 27, 2012, appellant requested reconsideration. In an attached statement, he noted that he did not realize that all his medical benefits would be terminated. Appellant contended that he still needed medication for continued pain and swelling in his right hand and for his mental health. He argued that Dr. Pham-Bailey's December 6, 2011 report demonstrated that he still had chronic de Quervain's tenosynovitis and right hand chronic tendinitis. Appellant pointed out that Dr. Pham-Bailey had treated him since the beginning of his condition but Dr. Conaty only examined him once. He questioned how Dr. Conaty could opine that his right wrist and hand were okay when he never asked him how his hand felt.

In a December 6, 2011 report, Dr. Pham-Bailey stated that she was appellant's treating physician for his accepted conditions of right radial styloid tenosynovitis and right wrist and hand tenosynovitis. She noted that appellant continued to complain of chronic right wrist pain over the dorsal wrist and thumb. Upon examination of his right wrist and thumb, Dr. Pham-Bailey observed mild tenderness of the first dorsal right wrist compartment and no tenderness over the right radial styloid. Finkelstein's test and carpal compression testing were negative. Dr. Pham-Bailey diagnosed right chronic de Quervain's tenosynovitis and right chronic extensor tendinitis. She stated that further medical treatment should be provided on an industrial basis, which included medication and a right wrist and thumb brace. Dr. Pham-Bailey also reported that appellant still needed permanent work restrictions of no repetitive right hand grasping and no carrying or delivery of mail with the right hand.

In a January 21, 2012 report, Dr. Brian Hutchinson, a Board-certified orthopedic surgeon, related appellant's complaints of right wrist pain for years that increased with swelling when he tried to do significant activity with his wrist. He noted that appellant sustained an injury at work when he pushed a heavy cart and twisted his wrist. Upon examination of the right upper extremity, Dr. Hutchinson observed full range of motion actively of the digits and tenderness to palpation diffusely at the radial and dorsal aspect of the wrist. He also noted pain with maximal flexion and extension of the wrist in the same area. Range of motion of the wrist was good. Finkelstein's test was positive and Tinel's test was mildly positive for carpal tunnel. Dr. Hutchinson reported that x-rays of the wrist taken that day were essentially unremarkable with some slight calcification at the radial styloid. He opined that these findings might be related to chronic de Quervain's tendinitis. Dr. Hutchinson diagnosed tendinopathy of extensor carpi radialis, extensor digitorum tendons, and severe tendinopathy or partial tear of extensor carpi ulnaris tendon. He stated that he discussed the problem and treatment options with appellant and gave appellant a cortisone injection.

By decision dated February 21, 2013, OWCP denied modification of the December 15, 2011 termination decision. It found that Dr. Conaty's second opinion report continued to represent the weight of medical evidence that appellant no longer suffered residuals or disability causally related to the July 20, 2006 employment injury.

In an appeal request form dated February 17, 2014 and received by OWCP on February 27, 2014, appellant requested reconsideration of the February 21, 2013 decision. In an attached statement, he related that he had suffered from post-traumatic stress disorder and other mental health struggles for the past few years. Appellant noted that his family helped with his struggles but his mom recently died from breast cancer. He requested that OWCP consider the most recent February 15, 2014 examination by Dr. John T. Knight, a Board-certified orthopedic surgeon, who specialized in hand surgery, and provided Dr. Knight's credentials. Appellant reviewed the examination findings of Drs. Pham-Bailey, Hutchinson, and Knight and noted that they all continued to diagnose him with his accepted condition of right wrist tenosynovitis. He alleged that Dr. Conaty's x-ray machine was worn-out and old and did not show a detailed, thorough picture. Appellant contended that the MRI scan and x-ray machines of the hands specialists, Drs. Hutchinson and Knight, were newer, which was why they were able to assess that his right wrist injury had not yet resolved.

In a February 15, 2014 report, Dr. Knight examined appellant for complaints of right wrist pain. He noted that in 2007 appellant was pushing a heavy cart for the employing establishment when he developed pain in his right hand and wrist. Dr. Knight reviewed appellant's history and stated that an October 11, 2011 MRI scan of the right wrist revealed increased signal on the first dorsal compartment consistent with extensor tenosynovitis. Examination of the right wrist revealed mild swelling and moderate tenderness of the first dorsal compartment and mild-to-moderate tenderness at the trapeziometacarpal (TMC) joint. Dr. Knight reported normal sensation with no crepitus and full range of motion in all digits of the right hand and wrist. Finkelstein test was positive. Dr. Knight stated that x-rays of the right hand and wrist taken that day were negative. He diagnosed right wrist de Quervain's synovitis and tenosynovitis. Dr. Knight opined that it was within medical probability that appellant developed right hand and wrist injury as a result of pushing and lifting a mail cart in 2007 at work. He stated that appellant's right wrist injury should be covered under federal workers' compensation.

Appellant submitted partial progress notes by Dr. Pham-Bailey dated July 11, 2007 and February 26, 2009. Dr. Pham-Bailey related appellant's complaints of hand pain and diagnosed right wrist de Quervain's tenosynovitis and extensor tendinitis. She stated that appellant could continue to work with restrictions of no repetitive right hand forceful grasping or hand motion over five pounds and no carrying or delivery of mail with right hand.

Appellant also resubmitted part of Dr. Pham-Bailey's December 6, 2011 report and Dr. Hutchinson's January 20, 2012 report.

By decision dated March 18, 2014, OWCP denied appellant's request for reconsideration on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP. It determined that the most recent merit decision on record was the February 21, 2013 decision denying modification of the termination decision. Because appellant's request for reconsideration was not received until February 27, 2014, his claim was untimely filed. OWCP further determined that the evidence submitted after the last merit decision was insufficient to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought.² The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁴

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁵ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of

² 20 C.F.R. § 10.607.

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁵ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁹ *Id.*

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

error.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹²

ANALYSIS

The only decision before the Board is the March 18, 2014 nonmerit decision, in which OWCP denied appellant's request for reconsideration on the grounds that his request was untimely filed and failed to establish clear evidence of error. In a decision dated February 21, 2013, OWCP denied modification of a December 15, 2011 decision that terminated appellant's medical and wage-loss compensation benefits. In an appeal request form, received by OWCP on February 27, 2014, appellant requested reconsideration. The Board finds that more than one year elapsed from the most recent OWCP merit decision dated February 21, 2013, to appellant's request for reconsideration received on February 27, 2014. Thus, appellant's request for reconsideration was untimely.

The Board also finds that appellant failed to establish clear evidence of error. Along with his request for reconsideration, appellant provided a statement explaining that he suffered from post-traumatic stress disorder and other mental health conditions. He requested that OWCP consider the most recent February 15, 2014 examination by Dr. Knight, which demonstrated that his right wrist injury had not yet resolved. The Board finds that appellant's allegations do not raise a substantial question as to the correctness of OWCP's February 21, 2013 decision.

Appellant submitted various reports by Drs. Pham-Bailey and Hutchinson that were previously of record and partial progress notes by Dr. Pham-Bailey dated July 11, 2007 and February 26, 2009. He also submitted a February 15, 2014 report by Dr. Knight not previously reviewed by OWCP. Dr. Knight reviewed appellant's medical history and provided findings on examination of his right wrist. He diagnosed right wrist de Quervain's synovitis and tenosynovitis. Dr. Knight opined that appellant's right hand and wrist injury resulted from his employment and stated that the injury should be covered under federal workers' compensation. While his report is generally supportive of appellant's current right wrist condition and inability to work full duty, it does not establish clear error on the part of OWCP in terminating appellant's medical and wage-loss compensation benefits.

The medical reports appellant submitted in support of his untimely request for reconsideration are insufficient to shift the weight of evidence in favor of appellant's claim or raise a substantial question that OWCP erred by terminating his medical and wage-loss compensation benefits. Therefore, the Board finds that he has not presented clear evidence of error on the part of OWCP.

As previously noted, the term clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (October 2011).

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

development, is not clear evidence of error.¹³ None of the evidence submitted manifests on its face that OWCP committed an error in terminating appellant's compensation based on the finding that he no longer suffered residuals or disability causally related to his right wrist injury. Thus, the evidence is insufficient to establish clear evidence of error.

On appeal, appellant reiterated his disagreement with Dr. Conaty's second opinion report and alleged that the medical evidence continued to support his need for medical treatment. As previously explained, however, the Board does not have jurisdiction over the merits of the termination issue of the claim. It can only make a determination regarding the March 18, 2014 nonmerit decision of OWCP.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ *Supra* note 11.